November 27, 1981

Mr. George A. Fitzsimmons
Secretary
Securities and Exchange Commission
500 North Capitol Street, N.W.
Washington, D.C. 20549

Re: File Nos. S7-893, S7-896, S7-898

Dear Mr. Fitzsimmons:

The Exchange is pleased to respond to the Commission's request for comments on certain aspects of the integrated disclosure program proposed in Releases 33-6331 through 33-6338. In these releases, the Commission has proposed to reduce the disclosure burdens on publicly owned companies while assuring a sufficient level of disclosure to prospective investors. The proposals have been reviewed by the Exchange's Public Policy Committee, Listed Company Advisory Committee and Legal Advisory Committee.

The Commission's efforts to integrate the separate disclosure systems which have evolved under the Securities Act of 1933 and the Securities Exchange Act of 1934 present a number of difficult policy judgments for the Commission. The Exchange supports the general framework which is being proposed in these eight releases. At the same time, as the Commission itself recognizes, there are troublesome questions presented by the proposals, particularly with regard to the ability of underwriters to perform their important due diligence investigations and the proposal to expand the use of shelf registrations.

The following comments will address the proposed new registration forms, the proposed new rule on underwriter liability and the proposed new rule on delayed or continuous offerings of securities.

<u>Proposed New Registration Form S-3</u>

The Commission has considered a number of transactional tests to determine the eligibility of an issuer to use Form S-3 to offer equity securities. The objective of such a test is to limit the Form's availability to issuers which are actively and widely followed in the securities markets. The test currently proposed is that an issuer have a float with a market value of $150 million. Also proposed as an alternative eligibility test is the requirement that the issuer have a float with a market value of $100 million and an annual trading volume of 3 million shares.

Under the $150 million float test, approximately 917 of the Exchange's 1,530 listed common stocks would be able to use Form S-3 if, of course, they meet the "registrant"

requirements.[1] Under the proposed alternative standard, however, only 700 Exchange listed stocks would qualify. This substantially smaller number stands in contrast to the Commission's estimate that under the alternative criteria 2 percent more of the issuers in its survey sample would be eligible to use Form S-3 than would be eligible under the $150 million test. Even allowing for differences between the Commission's sample (which was drawn from Exchange, AMEX, and NASDAQ companies) and the Exchange's list, and also for differences in the periods of time sampled, the sharply reduced number of Exchange listed securities which would be eligible under the alternative criterion suggests that a requirement of 3 million shares traded annually may be more rigorous than the Commission intended.

The Exchange has determined that under an alternative float test of $100 million, an annual trading volume test of 2 million shares would result in 807 Exchange listed stocks being eligible to use Form S-3, a 1.5 million share test would qualify 866 listed stocks, and a 1 million share test would qualify 934.[2] Since the latter would permit about the same number of Exchange listed stocks to use Form S-3 as the $150 million float test, the Exchange urges that the Commission adopt $100 million float/1 million shares traded annually as the alternative standard which would be available in tandem with the $150 million float test.

Comparing the Exchange listed stocks which would be eligible to use Form S-3 under the $150 million float test with those that would be eligible under the alternative recommended above, it appears that there are 92 Exchange listed stocks which would not be eligible to use Form S-3 under the $150 million float test but would be eligible under the recommended alternative test. The alternative tests together, therefore, would enable a total of 1009 Exchange listed stocks, 69 percent of the list, to qualify for Form S-3.[3] This would seem to be appropriate and to be in keeping with the objective of the eligibility test.

Proposed Rule 176 - Circumstances Bearing on Determination of Due Diligence

Proposed Rule 176, which would substantially codify Section 1704(g) of the American Law Institute's proposed Federal Securities Code, is intended to indentify, for the courts, specific circumstances which the Commission believes may affect the determination of whether a defendant has discharged his due diligence obligation under Section 11 of the Securities Act. The proposal is made in response to concerns expressed by a number of persons and committees over the last few years that the time available, primarily to underwriters, to perform due

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[1] The data on market value of the "float" are based on all trading on the Exchange on September 30, 1981. It is not possible to identify trading in only shares that are considered part of the float. As a result, the numbers of listed stocks shown herein as eligible to use Form S-3 under various alternative tests are overstated.

[2] The data on annual trading volume are based on a one-year period ending December 31, 1980.

[3] As explained in note 1, however, the actual number will be less.

diligence investigations may be seriously reduced as the program to integrate the Securities Act and Exchange Act disclosure systems is developed.

The current proposal of Forms S-2 and S-3, which permit a new level of incorporation by reference of documents prepared by others at a time substantially in advance of a contemplated offering, accentuates the time problem which underwriters will face under the proposals. The Exchange supports the adoption of a rule, but is concerned that the proposed rule may not sufficiently modify the risk of liability faced by underwriters when they become involved with offerings under the proposed new Forms S-2 and S-3.

In particular, the rule should be stated in the form of a definition and should exculpate underwriters that reasonably rely upon an issuer's officers, employees or other agents. If underwriters are put on notice that such persons are not reliable, they properly should be required to go further.

The proposed rule, however, merely cites reasonable reliance on officers, employees and others as a relevant circumstance in the context of a release which reiterates prior court and Commission generalities about due diligence. Insistence upon a strict, rather than a flexible, standard of due diligence does not solve the problems posed by integrated disclosure. The Commission should acknowledge the nature of the current competition for underwriting business and the time pressures involved in an underwriting in any new rule respecting due diligence. Unless the Commission is willing to countenance a relaxed liability standard, an interpretive release in this area is not likely to give underwriters much comfort. If the Commission believes that Section 11 requires a stringent liability standard but sincerely wishes to come to the aid of underwriters, it should recommend an amendment of Section 11 to Congress.

In addition to proposing Rule 176, the Commission has attempted to assuage concerns by suggesting that underwriters may get a head start on their due diligence investigations by routinely following a number of issuers which may be expected to approach the underwriter to handle their offerings. While that procedure may on occasion prove helpful, it is unrealistic to rely upon such procedures to address the serious problems which underwriters will face. There is some reason to believe that issuers are increasingly more willing to switch underwriters, and this in turn increases competition among underwriters for the business of particular issuers. These are both positive developments, but they would tend to be suppressed by the Commission's "head start suggestion." Moreover, there will always be new issuer-clients coming to a particular underwriter for the first time.

Some have suggested another concern. Although, as the Commission observes, there is nothing to compel an underwriter to proceed with an offering before completing a due diligence investigation to its satisfaction, it has been suggested that an issuer anxious to go to market may, to some extent, select its underwriter on the basis of how little time that underwriter will require to perform its due diligence function. The Commission recognizes the negative public policy implications that could result if the least thorough underwriter should be considered the most desirable. The Exchange does not believe this is a realistic scenario. It would be contrary to the

issuer's own best interests. Furthermore, responsible underwriters could be expected to resist any such pressure.

The Commission has also asked for comments on whether Rule 461 should be amended to require that a managing underwriter, in connection with requesting acceleration, state whether it has had time to review documents incorporated by reference into the registration statement. The Exchange does not believe any such amendment would be appropriate. Surely underwriters are aware of their statutory obligations without requiring them to respond to an amended 461.

Delayed or Continuous Offerings

Proposed Rule 462A would prescribe the conditions under which an issuer, intending to offer securities under one of the appropriate forms -- including proposed new Forms S-1, S-2, or S-3 -- available to it, may delay commencement of the offering, or offer periodically, normally for up to two years after registration. In addition to authorizing, for the first time, fixed-price primary offerings off the shelf, the proposed rule would permit at-the-market ("ATM") primary offerings of equity securities off the shelf provided the offering is made through an underwriter who sells either into an existing market for the security on an exchange or in the over-the-counter market to a market maker.

In its comment of March 20, 1981, on Rule 462A as originally proposed, the Exchange raised questions about underwriter liability and the applicability of Rule 10b-6 with respect to specialists, block traders, other professionals on an exchange floor and other broker-dealers who may purchase Rule 462A securities for themselves or their customers. The Exchange is encouraged generally by the discussion of these questions in the release and by the "tentative conclusions" set forth. However, that discussion specifically leaves open the possibility that the specialist, block positioner or floor professional might, under some unstated circumstance, be a statutory underwriter or be participating in a distribution even though he performs only his usual function, has no agreement or understanding with the issuer or its underwriter and receives no unusual compensation. The Exchange urges that this inference be avoided. Furthermore, there seems to be an inconsistency in the release's discussion on the application of Rule 10b-6. First, in discussing the potential liability of market makers and block positioners or specialists, the release states:

> "The Staff takes the position that, for purposes of Rule 10b-6, a market professional who does not have any prior agreement or understanding with the issuer should not be deemed to be a participant in the issuer's distribution pursuant to a shelf registration statement solely because it purchases, in the ordinary course of its business, securities that are registered on the shelf and are offered by the issuer or a broker-dealer acting for the issuer."

However, shortly after making this statement, the release contradicts it by stating:

> "If a broker-dealer did not have a continuing agreement with the issuer, but participated in the offering in a limited capacity, such as in connection with a single block transaction off the shelf, it would have to refrain from further dissemination of any specific recommendation that it had issued prior to being invited to participate in the distribution or from issuing further recommendations, until its participation in the distribution ended."

Although not discussed in the release, the Exchange understands that a floor broker who is not associated with the underwriter but who receives sell orders from the underwriter for execution on the floor would not as a consequence be deemed to be an underwriter or to be participating in a distribution. The Exchange strongly urges that these interpretations be clarified and reflected in Rule 462A itself in order to provide the necessary degree of certainty for market participants.

Furthermore, as the release itself fully recognizes, the applications of Rule 10b-6 will depend importantly on some sure means of determining when a offering commences, when it is suspended or ended and when it recommences. The Exchange urges that specificity in this area be provided in any rule that may be adopted by the Commission.

The Commission has requested comments on the rules and procedures of self-regulatory organizations that might have an impact on the operation of proposed Rule 462A. In the case of an ATM primary offering, the Exchange's listing agreement would require that the additional shares or units of a listed issue be listed for trading on the Exchange before being offered. This is a familiar requirement to issuers, involves only a few administrative steps, and would not affect the use of the proposed rule. In addition, the Exchange's general policy on timely disclosure to the public of any news or information which might reasonably be expected to materially affect the market for the securities, which begins on page A-18 of the NYSE Company Manual and is restated in the listing agreement, would require timely public announcement of each occasion on which the offering commences. Moreover, the disclosure policy might require also a public announcement of the amount sold and the amount remaining.

In the case of a new issue offered under proposed Rule 462A, Exchange rules and procedures would become applicable only when the issuer decided to list. The listing standards would have to be met, the listing application and the SEC registration documents submitted to the Exchange, the listing fee paid; and the Exchange would have to file its concurrence to the issuer's Form 8-A and may request (under Rule 12d1-2) acceleration of the 30 days otherwise required by Section 12(d) of the Exchange Act for effectiveness. In addition, if the new issue is proposed to be traded on the Exchange simultaneously with, or a short period of time after, the public offering, the Exchange would have to determine, pursuant to its undertaking in Item 20 of Form I, to make an exception to the general policy stated therein. In general summary, the policy is not to permit dealings on the Exchange in securities in distribution or until the syndicate or selling group has been terminated, but an exception may be made when it appears the security will be broadly distributed and the syndicate terminated early.

Finally, Exchange Rules 391, 392 and 393, which provide alternatives for distribution a block of securities that cannot be absorbed in the regular market, might be used by underwriters in connection with an offering under Rule 462A.

The Commission has asked for comment upon the impact which proposed Rule 462A might have on the secondary market. Since the rule does not restrict the array of offering techniques available to the issuer and its underwriter, it is likely that the impacts on the secondary markets would vary in type and severity. For example, an offering characterized by a fixed price, firm commitment and syndicate might have less impact than an ATM offering that is attempted to be sold over a period of time on the Exchange. In both cases, however, the fact that the offering can stand in the wings for a least two years may have, at least initially, a dampening impact upon secondary trading in the stock.

In its release, the Commission anticipates that a primary offering of equity securities at the market might either be on a firm commitment basis or on a best efforts basis. Section 11(a) of the Securities Exchange Act of 1934 provides no exception which would permit the underwriter who is a member of an exchange to sell the underwritten securities for his own account on that exchange. Currently, any such sale would have to comply with Section 11(a)(1)(G) of the 1934 Act and with Rule 11a1-1(T) thereunder, but it is not likely that an underwriter would be prepared to distribute securities under those condition. If the Commission adopts Rule 462A, it might also consider adopting a companion rule under Section 11(a) so as to permit a member of an exchange to offer securities being underwritten by the member for its own account on that exchange.

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The Exchange commends the Commission's efforts to make the registration of securities more efficient and less costly. Please let us know if we can be of further assistance.

Sincerely,

James E. Buck